

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

UNITED FOOD AND COMMERCIAL WORKERS
UNION, et al., individually and on behalf of all
others similarly situated,

Plaintiff,

v.

CHESAPEAKE ENERGY CORPORATION,
AUBREY K. MCCLENDON, MARCUS C.
ROWLAND, MICHAEL A. JOHNSON, RICHARD
K. DAVIDSON, FRANK A. KEATING, BREENE
M. KERR, CHARLES T. MAXWELL, MERRILL
A. MILLER JR., DONALD L. NICKLES,
FREDERICK B. WHITTEMORE, UBS
INVESTMENT BANK, ABN AMRO, BANC OF
AMERICA SECURITIES LLC and WELLS
FARGO SECURITIES,

Defendants.

CASE NO: 5:09-cv-01114-D
CLASS ACTION

**UNDERWRITER DEFENDANTS' REPLY BRIEF
IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT**

For the reasons stated in the Motion to Dismiss, Motion to Strike and the Memoranda of Law in Support of the Motions submitted by Chesapeake Energy and the Individual Defendants, in their Reply Memoranda, and for the reasons stated herein, Plaintiff's claims should be dismissed as to the Underwriter Defendants.

Plaintiff's Opposition to the Underwriter Defendants' Motion to Dismiss completely misconstrues the Underwriter Defendants' Motion to Dismiss. Plaintiff disregards that "[i]n order to state a claim under §12(a)(2), the complaint must allege by whom the plaintiffs were solicited and from whom they purchased shares; these

assertions must be supported by specific factual allegations demonstrating a direct relationship between the defendant and the plaintiff-purchaser.” *In re Royal Ahold N.V. Sec. & ERISA Litig. (Royal Ahold I)*, 351 F.Supp.2d 334, 406 (D. Md. 2004) (citing *Pinter v. Dahl*, 486 U.S. 622, 651 (1988)). Here, Plaintiff fails to allege in the Amended Complaint that Plaintiff purchased the securities at issue from or was solicited by any of the Underwriter Defendants or the Underwriter Defendants generally. *See Maher v. Durango Metals, Inc.*, 144 F.3d 1302, 1307 (10th Cir. 1998); *see also In re Royal Ahold N.V. Sec. & ERISA Litig. (Royal Ahold II)*, 384 F.Supp.2d 838, 841 (D. Md. 2005) (noting that “[t]he principal defect in the consolidated amended complaint was its failure to allege specifically from what entity Lead Plaintiff . . . purchased shares of Royal Ahold stock and by whom it was solicited”).

Similar to the circumstances in *Royal Ahold I*, the Amended Complaint sets out only broad allegations regarding the Underwriter Defendants’ roles in the offering but does not make any allegation as to whether Plaintiffs purchased the Chesapeake securities from any of the Underwriter Defendants or whether Plaintiffs were solicited to purchase securities from the Underwriter Defendants. Although Plaintiff cites to ¶22 of the Amended Complaint in support of the assertion that the Underwriter Defendants were sellers under Section 12(a)(2), *see* Plaintiff’s Opposition to Underwriter Defendants’ Motion to Dismiss Amended Complaint at 1-2, that paragraph provides no allegation as to whether Plaintiff was solicited by means of those roadshows or whether any the solicitations were successful. *See* Amended Complaint ¶22. Without an allegation connecting the Underwriter Defendants to the Plaintiff-purchasers the Section 12(a)(2) is

insufficient to state a claim against the Underwriter Defendants. *See Royal Ahold II*, 384 F.Supp.2d at 844.

Further, Plaintiff's reliance on *In re Worldcom, Inc. Sec. Litig.*, 294 F.Supp.2d 392 (S.D.N.Y 2003), is misplaced. Although a plaintiff need not specify at the pleading stage from which specific underwriter the plaintiff purchased the securities at issue, the plaintiff must, at a minimum, allege that the securities were purchased from the underwriters or that the underwriters solicited the sale of the securities to the plaintiff. *See In re Westinghouse Sec. Litig.*, 90 F.3d 696, 718 (3d Cir. 1996) ("Absent a particularity requirement, plaintiffs must provide a short and plain statement showing that the underwriter defendants are statutory sellers and that plaintiffs purchased securities from them."). Here, not only does Plaintiff fail to allege which underwriter specifically sold to or solicited the sale of the securities to Plaintiff, but the Amended Complaint fails to even set forth such an allegation against the Underwriter Defendants generally so as to put the Underwriter Defendants on notice of the claims against them.

For the reasons stated in the Underwriter Defendants' Motion to Dismiss and for the reasons stated herein, Plaintiff's Section 12(a)(2) claim is deficient and it must be dismissed as to the Underwriter Defendants.

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of March, 2010, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing. Based on the electronic records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the ECF registrants, any party who did not receive a copy by ECF was served by mail:

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